

May 12, 2006



Marlene H. Dortch
Secretary
Federal Communications Commission
TW-A325
445 Twelfth St., SW
Washington, DC 20554

Re: MB Docket No. 05-255
MM Docket No. 92-264

Dear Ms. Dortch:

In its April 26, 2006 *Reply Comments*, the National Cable and Telecommunications Association (NCTA) asserts that penetration of cable services has not met the second prong of “70/70 test” set forth in Section 612(g), and, given market conditions “it is highly doubtful that the threshold will ever be crossed.” *NCTA Reply* at 2 (emphasis in original). This letter presents newly available information bearing on this claim.

The most recent first quarter reports from Comcast and Time Warner, the largest incumbent cable providers, contradict NCTA’s emphatic assertion. Furthermore, NCTA’s assertions with regard to previous submitted counts and methodology raise more questions than they answer. The Commission should either conclude that the subscriber penetration meets the second prong of the 70/70 test, or require more detailed reporting from the parties that have the necessary information.

NCTA repeatedly insists that cable operators (including, apparently, terrestrial overbuilders) continue to lose subscribers to non-cable operators such as DBS. NCTA appears so confident in the gradual demise of its own industry that it enthusiastically avers to the Commission that “it is highly doubtful that the threshold will ever be met.” *NCTA Reply* at 2 (emphasis in original).

Incumbent cable operators, however, have recently reported significant subscriber gains, undermining NCTA’s assertion. In the first quarter of 2006, Comcast, the nation’s largest operator, gained 46,000 new basic subscribers this year, more than compensating for the 28,000 basic subscribers lost in the entirety of 2005.¹ As Comcast’s CEO Brian Roberts explained on a conference call with analysts, this subscriber growth does not represent cannibalization of digital subscribers (which also

¹Comcast Q1 2006 Conference Call, April 27, 2006 (transcript available at Seeking Alpha Network, the Media Stock Blog. <http://mediastockblog.com/article/9665> (visited May 10, 2006)).

grew), but represents genuine new subscribers to Comcast.² On the same call, other Comcast executives stated that Comcast fully expects this subscriber growth to *continue* rather than decline.³

Time Warner, the second largest incumbent cable operator, experienced a similar increase in basic subscriber numbers. In February, Time Warner announced a total increase in its basic subscriber base for the fourth quarter of 2005 of 34,000 subscribers, with a total increase of 73,000 subscribers for all of 2005.⁴ On May 3, Time Warner announced that it had gained a further 82,000 basic subscribers.⁵ Again, Time Warner emphasized in its statements that this growth represented *net* subscriber growth, not downgrades of digital subscribers to basic service.

These numbers are consistent for the industry. For example, Cablevision recently reported a gain of 38,722 subscribers, its *eighth consecutive quarter of subscriber gains*.⁶ Charter reported gains of 29,700 basic subscribers.⁷ These numbers seem strongly at odds with the confident assertion of NCTA that “it is highly doubtful that the threshold will ever be met.”

With respect to the related matter of what to include in subscriber counts and how to determine them, NCTA concedes that the Commission should include terrestrial cable overbuilders, such as Verizon and RCN, in the penetration tests of Section 612(g). *NCTA Reply* at 4. NCTA asserts, however, that it already includes these numbers when providing data to the Commission as part of its regular response to the FCC’s annual public notice that it solicits information for the competition report

²*Id.*

³*Id.*

⁴Time Warner Fourth Quarter and 2005 Year End Results Press Release (February 1, 2005). Available at <http://ir.timewarner.com/downloads/4Q05earnings.pdf> (Visited May 10, 2006).

⁵Time Warner First Quarter Results Press Release (May 3, 2006). Available at <http://ir.timewarner.com/releases.cfm?ptype=1> (Visited May 11, 2006).

⁶TradingMarkets.com, “Cable Vision Systems Q1 Loss Narrows,” May 9, 2006. <http://www.tradingmarkets.com/tm.site/news/TOP%20STORY/249475/> (Visited May 10, 2006).

⁷TV Week, Charter Reports Widening Q1 Loss Amid Rising Operating Costs, May 2, 2006. Available at <http://www.tvweek.com/news.cms?newsId=9899> (Visited May 10, 2006).

required under Section 628. *Id.* Therefore, according to NCTA, adding the 1.5 million subscribers attributed by the Commission to terrestrial overbuilders (as opposed to incumbent cable operators) to the number of cable subscribers reported by NCTA would double count these subscribers.

As an initial matter, AIVF, *et al.* did not intend to imply that the Commission could rely upon the unverified numbers submitted by NCTA. To the contrary, as AIVF, *et al.* explained at length, the Commission's reliance on the unverified subscriber numbers submitted by self-interested industry participants has undermined the reliability of the Commission's industry reports and regulatory actions. *Comments of AIVF, et al.*, at 6-11.

Indeed, comparing publicly available subscriber numbers, as well as data previously available from NCTA's website,⁸ underscores the problem of blindly accepting NCTA's subscriber figures and undermines the claim that including terrestrial overbuilders would be "double counting." For example, NCTA's website now reports a total number of subscribers for the year 2005 of 65,400,000. This represents a very precipitous drop from the 73,219,660 basic cable subscribers reported on the website in February 2005.⁹ Nothing in the public statements of any of NCTA's members, or even the overbuilders it purports to include in its subscriber count, can account for this sudden loss of nearly 8 million subscribers.

The 65,400,000 number, however, does match the number given in the Commission's *12th Competition Report* as attributable to **incumbent** cable operators for 2005. *12th Annual Report* at ¶10. The Commission, at least, found an additional 1.5 million subscribers to competing terrestrial overbuilders. *Id.* at ¶14. That NCTA's combined incumbent cable provider and overbuilder subscriber numbers precisely match those given in the *12th Annual Report* for incumbents (but not terrestrial overbuilders) undermines NCTA's claim that inclusion of the 1.5 million overbuilder subscribers identified by the Commission constitutes a "double count."

Finally, NCTA's list of the subscriber counts for the "Top 25 Cable Operators," which includes overbuilders, does not appear to match the public statements of these operators. For example, NCTA gives RCN's subscriber count at the end of 2005 as

⁸NCTA appears to have modified its website so that previous subscriber numbers for basic cable are not available. The only data available publicly can be found at <http://www.ncta.com/ContentView.aspx?contentId=66> and at <http://www.ncta.com/ContentView.aspx?contentId=73>.

⁹See *Reply Comments of SBC*, filed October 11, 2005 at 15 (citing a url no longer accessible on NCTA's website).

370,000, while RCN asserts a total subscriber count of 409,000.¹⁰ While perhaps modest in light of the other discrepancies noted above, the unexplained undercount further undermines confidence in NCTA's claim to have provided accurate numbers for both incumbents and terrestrial overbuilders.

¹⁰Compare NCTA's numbers at <http://www.ncta.com/ContentView.aspx?contentId=73>. With RCN's year end press release, available at <http://investor.rcn.com/ReleaseDetail.cfm?ReleaseID=190323>.

These discrepancies support the position taken by AIVF, *et al.*, AT&T and others that the Commission cannot rely on data submitted by NCTA and other incumbent cable operators, nor can the Commission allow these parties to select from among the third party reporters beholden to the cable industry. Nor can the Commission ignore its responsibilities under Section 612(g) and Section 628(g) of the Communications Act to provide Congress with accurate reports on the status of competition in the MVPD industry. The Commission must therefore either take the steps recommended by GAO and others to ensure accurate reporting, such as requiring certified reports of subscribers from all operators subject to independent verification¹¹ or accept the information derived from the publically available data submitted by AT&T.

Since Congress first required the FCC to issue reports on competition in the MVPD industry, the FCC has simply relied on the unsubstantiated word of the most interested parties as to the state of the industry. The FCC's continued inability to answer the relatively simple question of the of cable penetration in the United States demonstrates the problems with this methodology. As the General Accounting Office observed, this abandonment of responsibility by the agency has undermined the ability of both the FCC and Congress to effectively monitor and regulate the cable industry.¹² The time has come to put an end to this increasingly outrageous effort to avoid the responsibility imposed upon the agency by statute. The FCC should assume cable subscribership has met the penetration test of Section 612(g) or require more rigorous reporting to end all doubt, and should carry out the recommendations made by AIVF, *et al.* in its comments of April 3, 2006.

Respectfully submitted,

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¹¹*See, e.g.*, GAO, "Data Gathering Weaknesses In FCC's Survey Of Information On Factors Underlying Cable Rate Changes," (2003).

¹²GAO, "Issues Related To Competition and Subscriber Rates In the Cable Industry," (2003).

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